BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

DIANNA L. REVES	)	
Claimant	)	
V.	)	
	)	
STATE OF KANSAS	)	Docket No. 1,071,000
Respondent	)	
AND	)	
	)	
STATE SELF-INSURANCE FUND	)	
Insurance Carrier	)	

ORDER

Claimant, through Rodney Olsen, of Manhattan, requests review of Administrative Law Judge Rebecca Sanders' July 29, 2015 preliminary hearing Order. Nathan Burghart, of Lawrence, appeared for respondent and insurance carrier (respondent).

The record on appeal is the same as that considered by the judge and consists of the July 28, 2015 preliminary hearing transcript and exhibits thereto, in addition to all pleadings contained in the administrative file.

ISSUES

Claimant's application for hearing, filed in September 2014, alleged repetitive injuries to her right arm starting in April 2004 and ending around March 2007. She sought court-ordered medical treatment. At the preliminary hearing, she requested to amend her application for hearing such that her asserted series of repetitive traumas would have no ending date. The judge ruled claimant's date of accident was July 13, 2007, and she thus failed to timely file her application for hearing over seven years later.

On appeal, claimant contends she erred in alleging repetitive injury with an ending date of March 26, 2007.[1] She requests the Order be reversed, arguing in her appeal brief that her date of accident or date of injury by repetitive trauma should be December 18, 2013, which is what she says was her last day worked. However, claimant argues pre-May 15, 2011 law applies – and the prevailing factor requirement is not relevant – because her symptoms started before the 2011 amendments to the Kansas Workers Compensation Act (KWCA). Claimant also argues respondent provided medical treatment at a February 14, 2014 independent medical evaluation, such that her application for hearing was timely. Claimant advances no argument that the judge should have granted her motion to amend the dates of injury she alleged.

[1] Claimant's Brief at 2.

Respondent maintains the Order should be affirmed. Respondent agrees with the judge's finding regarding date of accident and her conclusion that an application for hearing being filed over seven years later bars the claim.[2]

The appealable issues are:

1. What is claimant's date of accident or injury by repetitive trauma?

2. Did claimant file a timely application for hearing?[3]

FINDINGS OF FACT

Claimant worked for Kansas State University. For eight hours a day, she inputted data to pay bills. She initially developed right little finger and ring finger numbness.

Regarding claimant's right hand, ring and little finger injuries, respondent completed an Employer's Report of Accident on July 14, 2004, and another such form on April 10, 2007.

Respondent sent claimant for authorized medical treatment with a doctor in Manhattan before sending her to J. Mark Melhorn, M.D., on July 13, 2007. Dr. Melhorn performed a right ulnar nerve elbow decompression on Tuesday, April 15, 2008. On June 16, 2008, Dr. Melhorn rated claimant's right arm at 5% functional impairment for pain, discomfort and loss of sensation (3.4%) and strength loss (1.6%), but nothing for loss of motion or muscle atrophy. Dr. Melhorn released her to regular work without restrictions.

Respondent last paid for claimant's medical treatment by way of a check dated November 13, 2008.

On January 13, 2014, claimant completed an Injured Employee's Report of Injury for her left small and ring fingers from continuously inputting data. Such document stated she had the same injury to her right hand on March 26, 2007.

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[2] Respondent also argues claimant failed to present medical evidence that she needs additional medical treatment. Even if such position is accurate, the Board lacks jurisdiction on any such issue on review of a preliminary hearing decision. Respondent also argues claimant did not produce evidence that her work was the prevailing factor in her asserted right upper extremity complaints. This issue will not be addressed because the judge did not rule regarding prevailing factor. The Board has authority to rule on "questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge." See *Hunn v. Montgomery Ward*, No. 104,523, 2011 WL 2555689 (unpublished Kansas Court of Appeals opinion filed June 24, 2011).

[3] This issue could include determining when respondent last furnished claimant medical treatment, which is the equivalent of the payment of compensation. See *Riedel v. Gage Plumbing and Heating Co. Inc.*, 202 Kan. 538, 539, 449 P.2d 521 (1969).

The parties attempted to settle claimant's then-undocketed right upper extremity case on January 21, 2014. Respondent sought to close out what was termed a March 26, 2007 date of accident involving claimant's right arm, in addition to any and all other claims. Claimant testified she had yet to have medical treatment for her left arm and complained of ongoing right hand symptoms. Claimant said respondent told her she could not get any more medical treatment for her right hand because she waited over five years and her only option was to settle. She indicated she "improvised with my right hand with my left because I had so much trouble with it and now I'm having the same things happening to my left hand as my right hand."[4] Special Administrative Law Judge (SALJ) Dan McCulley noted claimant flexed her right hand a lot during the hearing, indicating she was still having problems. The SALJ concluded settlement was not in claimant's best interest.

Respondent sent claimant to Chris D. Fevurly, M.D., for a February 14, 2014 appointment. While the corresponding report lists claimant's chief complaint as "left ulnar nerve pain" with a December 3, 2013 date of injury, Dr. Fevurly noted claimant's right arm complaints were worse than her left arm complaints. Dr. Fevurly noted claimant retired on January 22, 2014, after 26 years of work for respondent.[5]

On Dr. Fevurly's examination, claimant had a 30° loss of extension of her right elbow. She had obvious atrophy of her right hypothenar muscle, diminished sensation of her right ulnar nerve distribution and slight right hand weakness. Claimant's left-sided physical findings were less significant. Dr. Fevurly diagnosed her with ulnar nerve inflammation and entrapment or ulnar neuritis/cubital tunnel syndrome, but noted keyboarding is not a proven risk factor for the development of such condition. Dr. Fevurly stated he could not say the prevailing factor in claimant's condition was her work and noted women, particularly women in claimant's age group, commonly have ulnar neuritis.

Claimant filed an application for hearing on September 2, 2014, alleging repetitive trauma causing carpal tunnel syndrome to her right arm from April 2004 until March 2007.

Bryce Palmgren, M.D., evaluated claimant on March 24, 2015. Dr. Palmgren noted claimant had bilateral elbow and hand numbness and tingling, including in her ring and little fingers of both hands, with symptoms greatest in her right hand and elbow. Claimant reported her symptoms improved after retiring from her data entry job. Dr. Palmgren noted an EMG study showed mild left cubital tunnel and carpal tunnel syndromes. He diagnosed claimant with bilateral cubital tunnel syndrome. Dr. Palmgren recommended left cubital tunnel transposition and noted right cubital tunnel surgery could also be performed. Claimant told Dr. Palmgren her right elbow might still be covered under workers compensation insurance. Dr. Palmgren voiced no opinion on causation.

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[4] P.H. Trans., Resp. Ex. A at 11-12.

[5] Claimant testified she retired on January 26, 2014. (*Id*. at 9).

Dr. Palmgren performed the left-sided surgical procedure on April 8, 2015. Claimant improved and requested such treatment for her right ulnar nerve.

At the preliminary hearing, through her attorney, claimant requested to amend her application for hearing to assert a "series not with an ending date."[6] Respondent's counsel characterized such request as argument. Claimant's oral motion was not explicitly ruled upon.

The judge asked claimant if she missed any time from work due to her injury:

> Q. Now, at any point during your treatment for your right were you ever taken off of work because of your injury or your surgery or anything like that?
>
> A. They never paid any. I went right back to work just as soon as and - - in fact, no, I didn't even take off hardly any days because - -
>
> Q. Did you take off any days?
>
> A. I used it right away. No. Workmens' comp paid me nothing. I went back as soon as I could. But I think I had it done on a Friday, so the day of the surgery and then by Monday, yes.
>
> Q. You were back at work?
>
> A. Yes.[7]

The judge's Order stated, in part:

> Claimant does not recall the date when she gave Respondent notice of her injury to her right upper extremity. Claimant was not taken off work. There is no record of when Claimant was told her injury was work related. So in accordance with K.S.A. 44-508(d) none of the specific criteria for date of accident is met. Thus the administrative law judge will determine date of accident.
>
> There is no specific date provided when Claimant gave Respondent notice of the injury. However, Claimant was sent to see Dr. Melhorn by Respondent. Claimant first saw Dr. Melhorn on July 13, 2007. It is reasonable to conclude Claimant gave notice of her injury on or around July 13, 2007 or before.
>
> It is found and concluded that July 13, 2007 is Claimant's date of accident.
>
> . . .

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[6] *Id*. at 7.

[7] *Id*. at 27-28.

> Claimant filed an application for hearing on September 2, 2014. September 2, 2014 is more than three years since the date of accident of July 13, 2007 and more than two years since Claimant was last provided medical treatment for her right upper extremity which was sometime in 2008.
>
> Therefore the claim for workers compensation benefits for her right upper extremity is denied.[8]

PRINCIPLES OF LAW

The judge found a date of accident of July 13, 2007. Claimant requests a date of injury by accident or by repetitive trauma of December 18, 2013. In reviewing such potential injury or accident dates, there are similarities and differences between the "old law" (before May 15, 2011) and the "new law" (May 15, 2011 and thereafter).

An employer is liable to pay compensation to an employee incurring personal injury by accident or repetitive trauma arising out of and in the course of employment.[9] Claimant must prove her right to an award based on the whole record using a "more probably true than not true" standard.[10]

The statutory date of a series of accidents by repetitive trauma (old law) or an injury by repetitive trauma (new law) is a legal fiction:

> [D]esignation of an accident date in a repetitive use case is not a factual determination of the precise moment at which the claimant suffered the personal injury. . . . [A]ssignment of any single date as the "accident date" for a repetitive use/cumulative traumas injury is inherently artificial and represents a legal question, rather than a factual determination.[11]

The date of a series of accidents by repetitive trauma (old law) or an injury by repetitive trauma (new law) is determined by statute.[12] The statutes defining a series of repetitive accidents (old law) or injury by repetitive trauma (new law) are substantially different.

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[8] ALJ Order at 3-4.

[9] K.S.A. 2007 Supp. 44-501(a); K.S.A. 2013 Supp. 44-501b(b).

[10] K.S.A. 2007 Supp. 44-501(a) and K.S.A. 2007 Supp. 44-508(g); K.S.A. 2013 Supp. 44-501b(c) and K.S.A. 2013 Supp. 44-508(h).

[11] *Saylor v. Westar Energy, Inc.*, 292 Kan. 610, 615, 256 P.3d 828 (2011); see also *Curry v. Durham D & M, LLC*, No. 1,051,135, 2011 WL 1747854 (Kan. WCAB Apr. 27, 2011).

[12] K.S.A. 2007 Supp. 44-508(d); K.S.A. 2013 Supp. 44-508(e); *Saylor*, 292 Kan. at 620.

K.S.A. 2007 Supp. 44-508(d), states:

In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident by the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

K.S.A. 2013 Supp. 44-508(e) states:

"Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

K.S.A. 44-505(c), which was not amended in 2011, states:

> This act shall not apply in any case where the accident occurred prior to the effective date of this act. All rights which accrued by reason of any such accident shall be governed by the laws in effect at that time.

The Board has found accident dates varying from what a claimant alleges, including when a series of injuries is alleged over time.[13] Board Members have found a claimant may orally amend a date of accident at a preliminary hearing because date of accident is a question of fact based on the evidence and not limited by technical rules of procedure.[14] An important objective of workers compensation law is avoiding cumbersome procedures and technicalities of pleading to quickly reach a correct decision.[15]

The 2007 and 2013 versions of K.S.A. 44-534(b) state:

> No proceeding for compensation shall be maintained under the workers compensation act unless an application for a hearing is on file in the office of the director within three years of the date of the accident or within two years of the date of the last payment of compensation, whichever is later.

Bergstrom[16] states:

> The most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained. *Winnebago Tribe of Nebraska v. Kline*, 283 Kan. 64, 77, 150 P.3d 892 (2007). The legislature is presumed to have expressed its intent through the language of the statutory scheme, and when a statute is plain and unambiguous, the court must give effect to the legislative intention as expressed in the statutory language. *Hall*, 286 Kan. at 785, 189 P.3d 508.
>
> When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction. *Graham v. Dokter Trucking Group*, 284 Kan. 547, 554, 161 P.3d 695 (2007).

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[13] See *MacMillan v. Department of Transportation*, No. 184,813, 1998 WL 599396 (Kan. WCAB Aug. 31, 1998).

[14] See *Crouse v. O'Reilly Auto Parts*, No. 259,606, 2001 WL 507214 (Kan. WCAB. Apr. 16, 2001).

[15] See *Pyeatt v. Roadway Express, Inc.*, 243 Kan. 200, 205, 756 P.2d 438 (1988); K.S.A. 2007 Supp. 44-523(a) and K.S.A. 2013 Supp. 44-523(a).

[16] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 607-08, 214 P.3d 676 (2009).

ANALYSIS

Claimant artificially limited the time period in which she contended she was injured – April 2004 to on or about March 26, 2007, an assertion she now states was erroneous. At the preliminary hearing, she asked the judge's permission to amend her application for hearing to allege repetitive injury with no ending date. The underlying order does not explicitly rule on the motion and this Board Member will not assume it was impliedly denied. Claimant is now alleging an injury date of December 18, 2013.

Claimant proceeding to a hearing with one written allegation, but switching to an undefined allegation of an injury with no ending date can prejudice a respondent.[17] However, while noting claimant took inconsistent positions, respondent did not assert a due process argument. In fact, respondent has affirmatively asserted a "prevailing factor" defense, which is only applicable to new law cases.

With the understanding respondent is not asserting prejudice or unfair surprise, the controlling issue concerns date of accident or injury by repetitive trauma. Whether claimant's application for hearing was timely hinges on the same finding.

A date of injury due to repetitive trauma is a legal fiction, not controlled by the pleadings. Claimant's written allegation, by itself, does not make for a legal conclusion and it is not a binding stipulation. A date of injury by repetitive trauma, by the plain, unambiguous and literal terms of K.S.A. 2013 Supp. 44-508(e), does not include what a claimant lists on an application for hearing. Also not included as a triggering factor for date of injury by repetitive trauma is onset of a claimant's symptoms.[18]

This is a very difficult case and the record perhaps raises more questions than it answers, largely because the pleadings are at odds with reality.

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[17] See *Pyeatt*, 243 Kan. at 206 ("[V]ariance [from claimed date of injury] is fatal if the employer is required to defend against an award of compensation for an unknown injury.").

[18] Claimant asserts *McWilliams v. SOR, Inc.*, No. 105,904, 2012 WL 687952 (Kansas Court of Appeals unpublished opinion filed Feb. 24, 2012, *rev. denied* Apr. 1, 2013), controls what version of the KWCA applies. In *McWilliams*, the July 1, 2005 amendment to the KWCA regarding date of accident for a series of microtraumas was held not to retroactively apply to a claimant who started developing symptoms before the change in the law. As a result, the last day worked rule applied and her date of accident was not May 17, 2005, as found by the Board, but October 10, 2006, her last day worked.

However, the unpublished holding of *McWilliams* does not trump the Kansas Supreme Court's ruling in *Saylor*, *supra*. In such case, even though Mr. Saylor's symptoms began about 20 years prior, the Court concluded his date of accident was statutorily based on K.S.A. 2005 Supp. 44-508(d). *Saylor* explicitly rejected the judicially created last day worked rule. If claimant's argument were correct, Mr. Saylor's claim would have been controlled by the law in effect in early-1986. Instead, the law in effect for his March 28, 2006 date of accident applied. See *McWilliams,* (Leben, J., concurring in part and dissenting in part).

If we were proceeding under the old law, the date of accident could be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. Claimant, while wrong about having surgery on a Friday and returning to work the next Monday, testified she did not miss work due to her injury or surgery. There is no evidence regarding restrictions. Based on the current record, it appears no authorized doctor took claimant off work or gave her restrictions against doing work which arguably caused her condition.

Given the evidence presented, the earliest of two other contingencies would dictate the date of accident: (1) the date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker.

There is no evidence regarding the second criteria in the preceding paragraph. The record also does not show *claimant* gave respondent written notice before 2014. Claimant provided respondent with written notice on January 13, 2014, for a March 26, 2007 accident, and on or about September 2, 2014, for a series of injuries between 2004 and 2007. The former document was her Injured Employee's Report of Injury regarding her left small and ring fingers, which also stated she had the same injury to her right hand in 2007. The latter document was her application for hearing. The preliminary hearing Order does not address written notice, but the Kansas Supreme Court interpreted K.S.A. 44-508(d) to find a date of accident subsequent to a claimant's last day of work.[19] In *Saylor*, our Supreme Court literally applied K.S.A. 44-508(d) and found Mr. Saylor's date of accident was March 28, 2006 – when he provided Westar written notice – which was subsequent to his last day worked on February 6, 2006. The Court reached this conclusion despite the employer's arguments that doing so would be absurd, illogical and unreasonable.

Based on the current record, this Board Member disagrees with the judge's determination of a July 13, 2007 date of accident. Such date was dependent on the judge's review of "all the evidence and circumstances." However, such discretion is only available in cases where none of the other statutory criteria are met. Here, a date of accident could be found based on written notice, so resorting to "evidence and circumstances" is statutorily disallowed. *If* this were an old law case, this Board Member would find claimant's date of accident was January 13, 2014, the date she gave respondent written notice by telling respondent she had an injury to her right hand and it was the same type of injury as to her left fingers from data input.[20]

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[19] See *Saylor,* fn. 11.

[20] See *Brackett v. Dynamic Educational Systems, Inc.*, No. 1,047,965, 2012 WL 1652956 (Kan. WCAB Apr. 26, 2012); *Cox v. LaFarge North America*, No. 1,051,506, 2012 WL 1652960 (Kan. WCAB Apr. 20, 2012); *Ontiveros v. Wildcat Construction Co.*, No. 1,051,372, 2012 WL 1652959 (Kan. WCAB Apr. 12, 2012); and *Yingling v. Bill's Moving and Storage*, No. 1,034,841, 2007 WL 2937789 (Kan. WCAB Sept. 18, 2007).

However, it would be erroneous to apply the old law. Notwithstanding claimant's allegations, this is a new law claim. Claimant testified at her failed settlement hearing that she injured herself by performing repetitive work for years. Her brief indicates she last worked on December 18, 2013, while the evidence shows she retired in January 2014. Further, there is evidence she worsened and now has physical injuries varying from what was recorded in 2008. Based on Dr. Fevurly's 2014 examination, claimant now has decreased right elbow range of motion and obvious muscle atrophy. This evidence is different than what Dr. Melhorn recorded and demonstrates that her physical condition progressively deteriorated after 2008.

This Board Member concludes claimant's date of injury by repetitive trauma is her last day worked. The record is not entirely clear when she last worked, but it was apparently in late-2013 or early-2014. Nothing in this order precludes a potential later finding that claimant may have multiple dates of accident or injury by repetitive trauma, perhaps involving both the old law and new law.

This Board Member reverses the Order regarding date of accident and the claim being barred by K.S.A. 44-534(b). Claimant's date of injury by repetitive trauma under the new law was her last day worked. Her application for hearing was timely and there is no need to address when claimant was last provided medical treatment.[21]

CONCLUSIONS

Claimant's date of injury by repetitive trauma was her last day worked and her application for hearing was timely. The judge should have the initial opportunity to address any arguments regarding compensability and prevailing factor before those questions are properly before the Board. Such issues are remanded to the judge. Whether such determination requires another hearing is up to the judge and the parties.

WHEREFORE, the undersigned Board Member reverses the July 29, 2015 preliminary hearing Order and remands this matter consistent with the prior paragraph.[22]

IT IS SO ORDERED.

Dated this _____ day of October, 2015.

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[21] However, the Board has noted an IME is not medical treatment. *Guerrero v. Maximus, Inc.*, No. 1,010,958, 2003 WL 23172911 (Kan. WCAB Dec. 31, 2003).

[22] By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

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